

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

FILED

DEC 16 2008 *pk*

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES of AMERICA,

Plaintiff-Respondent

v.

ALVARO LARIOS,

Defendant- Movant

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Civil Action

No. SA-8-CA-990-XR

Criminal Case

No. SA-6-CR-137(1)-XR

DISMISSAL ORDER

Before the Court is Movant Alvaro Larios' Successive Motion Pursuant to 28 U.S.C. § 2255 challenging his 2006 conviction for possession of a destructive device in the course of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1).

The record shows Movant Larios filed a previous § 2255 motion to vacate sentence that was denied on the merits by this Court on January 3, 2008. (*See* Docket Entries ## 47, 48). A movant that has had a previous § 2255 motion denied on the merits may not proceed with a second or successive § 2255 motion without the authorization of the Court of Appeals that the second or successive motion alleges newly discovered evidence or is based on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *See In re Tolliver*, 97 F. 3d 89, 90 (5th Cir. 1996). Movant failed to present an order to this Court from the Fifth Circuit Court of Appeals authorizing the filing of this successive Motion, and therefore Movant is not authorized to proceed with his § 2255 Motion.

Accordingly, Movant Larios' Successive § 2255 Motion is **DISMISSED WITHOUT PREJUDICE** as successive and for failure to obtain the authorization of the Court of Appeals to file

a successive motion. In the alternative, construing Movant's current filing as a motion for leave to file a successive § 2255 motion, the motion is **DENIED** for lack of jurisdiction. Title 28 U.S.C. § 2244(3)(A) requires that such a motion must be filed with the court of appeals.

DATED: December 16, 2008



XAVIER RODRIGUEZ
United States District Judge